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No. 00-800

IN THE

SUPREME COURT OF THE UNITED STATES

BOARD OF WATER, LIGHT AND SINKING FUND COMMISSIONERS OF THE CITY OF DALTON, GEORGIA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Through the brevity of its response in opposition, the Federal Energy Regulatory Commission (Commission or FERC) avoids addressing the issues that warrant the grant of Dalton's Petition for Writ. By limiting its record citations to Order No. 888, the Commission fails to consider its subsequent concessions which demonstrate that its unlawful undue discrimination finding under the first prong of section 206(a) of the Federal Power Act (FPA), 16 U.S.C. 824e(a), is based on allegations and potential actions rather than actual unlawful activities. Surely this raises before this Court an issue of statutory construction as significant as the issue (which FERC recognizes) of the permissibility of the regulations promulgated by Order 888 which compel public utilities to wheel electric energy. At no place does the Commission explain how the second prong of section 206(a) provides it with a general authority to compel wheeling in the face of the Solicitor General's persuasive arguments to this Court in Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973), that the FPA gave the Commission only very limited wheeling authority.

Section 206(a) is the Commission's most important procedural mechanism to curb abuses of public utilities' monopoly power over transmission. See FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956). The resolution of the issues raised by this appeal is important to the administration of the FPA. The grant of Dalton's Petition for Writ is needed in these turbulent times in the interstate electric industry (a) to prevent the further use of generic findings as to potential conduct as evidence of unlawful undue discrimination under the first prong of section 206(a), and (b) to provide a "bright-line" jurisdictional test to distinguish the transmission which public utilities may undertake voluntarily under the FPA from transmission which the Commission may compel them to provide under the Act.

I

FERC'S GENERIC FINDINGS FAIL TO SUPPORT A FINDING THAT ANY PUBLIC UTILITY IS CURRENTLY ENGAGED IN UNLAWFUL UNDUE DISCRIMINATION UNDER THE FIRST PRONG OF SECTION 206(a)

1. Dalton's appeal raises an issue of statutory construction. It is not Dalton's position that the Commission may not rely on generic findings to support a finding that all public utilities are engaged in a practice which is unduly discriminatory within the meaning of the first prong of section 206(a). Cf. FERC at 8. But those findings must meet the standards of section 206(a). It is Dalton's view that the Commission's burden of persuasion under the first prong of section 206(a) is not diluted when it relies on generic findings.

2. To demonstrate compliance with the first prong of section 206(a), the Commission quotes its generic finding in Order 888 that transmission monopolists "currently engage in unduly discriminatory practices". FERC Br. at 10. This conclusory finding is not supported by a footnote reference to the record. Recognizing this, the Commission cites findings in other portions of Order 888, directing the Court to certain texts found in the Appendix to the Petition for Writ filed by Enron Power Marketing, Inc. (Enron) in 00-809.[1] Id. A review of these "findings" reveals that they contain long recitals of allegations, some specifically challenged by the public utilities allegedly involved. Appendix C to Order 888, the largest part of the record thus relied upon, is entitled "Allegations of Public

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[1] Enron App. 209a-218a, 213a-214a, 315a-331a.

Utilities Exercising Transmission Dominance." Enron App. 315a. The text begins: "These are examples of allegations that various public utilities have refused to provide comparable service . . ." Id. at 316a. The Commission relies on a few of its earlier orders which, we submit, do not support the Commission's ultimate finding of undue discrimination. A 1974 order initiated an investigation against Pacific Gas & Electric Company under section 206 and, at the same time, denied a request to order the utility to wheel power for a petitioner because such a remedy was beyond the Federal Power Commission's authority under Otter Tail. See Enron App. 614a, n. 149; Pacific Gas & Electric Company, 51 FPC 1032, 1033 (1974) ("Further, with respect to wheeling, it has been determined that the Commission does not have the authority to order wheeling (Cf. Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973).") A 1993 order involving the same public utility held that a rate increase was prohibited by an underlying contract. See Enron App. 215a. The Commission found over a decade ago, in the context of a merger case under section 203 of the FPA, 16 U.S.C. 824b, that Utah Power & Light Company refused to permit wheeling. Enron App. 614a, n. 148.[2] The Commission also relies on the findings in Otter Tail, a case decided (and the unlawful practices remedied) more than a quarter century ago. Id. Casting about for further support, the Commission went so far as to rely on requests for transmission relief under FPA section 211, 16 U.S.C. 824j,[3] a statutory provision which clearly give the Commission authority to remedy unduly discriminatory conduct on a case-by-case basis. At the same time, the Commission brushed aside countervailing evidence

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[2] The Commission incorporated in Order 888 some of the findings in its Notice of Proposed Rulemaking. See Enron App. 215a, n. 260.

[3] Enron App. 216a.

that 106 public utilities had voluntarily offered to provide transmission under various open access tariffs, because approval of those tariffs would impair the Commission's obvious purpose to impose an industry-wide uniform Open Access Transmission Tariff (OATT).[4] This forced uniformity ignored the fact that mere differences in service are not unlawful. The statute forbids undue discrimination. See Northeast Utilities Service Co. v. FERC, 993 F.2d 937, 953-54 (1st Cir. 1993).

3. Dalton does not argue that the Commission should have made specific findings as to "each individual company" (emphasis added). Cf. FERC Br. at 11. Dalton does assert that appropriate findings were not made as to any public utility. In its brief in opposition the Commission neither denies nor accounts for post-Order 888 events which had a direct bearing on its generic findings of undue discrimination in Order 888. In Order 888-A, on rehearing, the Commission held that Order 888 "does not, nor was it intended to, make specific findings as to any particular utility or any particular allegation raised." (footnote omitted)[5] On appeal, the court below found: "FERC concedes that it relied upon general findings of systemic monopoly conditions and the resulting potential for anti-competitive behavior, rather than evidence of monopoly and undue discrimination on the part of individual utilities." NY App. C-20-C-21. By limiting its record citations on undue discrimination, the Commission never comes to grips with Dalton's contention that neither allegations of wrongdoing nor potentials to violate the law rise to the indignity of a violation of the first prong of section 206(a).

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[4] Id. at 218a, n. 266.

[5] Id. at 435a.

4. Enron, a large marketer of electric energy, denies that the construction of the text of the first prong of section 206(a) is an issue properly before this Court. Enron Br. at 7-8. To this end, it urges the Court to accept the Commission's general findings as to undue discrimination without examining either their real nature or the substance of the record behind them. Apparently it is enough for Enron that the Commission relied on "structural facts and elementary economics". Id. at 10. But this ignores the basic purpose of section 206(a).

Monopoly was a hallmark of the electric transmission business in 1935 when Part II of the FPA was enacted. Such monopolies were not outlawed by the statute. Private ownership was not separated from control and responsibility. Because monopolists can be expected to act in their own economic self interest (FERC Br. at 10), Congress enacted section 206(a) to provide a procedure for curbing abuses of those monopolies. Economic principles have a part to play in regulation under the FPA, but they can neither expand the reach of the statute nor provide a surrogate for the findings of actual illegal practices required by the first prong of section 206(a). Cf. FERC Br. at 11, n. 7.

5. The Court of Appeals held that it was premature for Dalton to challenge the effect of Order 888 on Dalton's rights under the antitrust conditions in certain nuclear licenses. Dalton has not raised that issue before this Court. However, Dalton does assert that neither the Commission's generic finding as to industry-wide undue discrimination nor the imposition of the OATT is appropriate as to Georgia Power Company in view of the evidence of that public utility's lack of monopoly power in the transmission of electric energy and the positive effect on competition of the integrated operation of the transmission system in Georgia under filed open access Inte-

grated Transmission System Agreements. Cf. FERC Br. at 10, n. 6; Enron Br. at 11, n. 3.

II

THE COMMISSION LACKS GENERIC AUTHORITY TO COMPEL TRANSMISSION

1. The decision in Transmission Access Policy Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000) does break new ground. Cf. FERC Br. at 12. The Solicitor General and the Commission are now as one in arguing that the Commission "has reasonably construed" the second prong of section 206(a) as conferring "broad authority to remedy unduly discriminatory behavior by an open-access requirement." FERC Br. at 12. There was no such unanimity in 1972 when Otter Tail was briefed to this Court. The basic issue then was whether the Federal Power Commission (FPC), predecessor of FERC, had such broad jurisdiction under the FPA to compel transmission to remedy such anti-competitive conduct as the denial of open access to transmission requested by a competitor that it displaced a court-imposed wheeling obligation in an antitrust case. The FPC filed an amicus brief claiming exclusive jurisdiction based on its jurisdiction to order interconnections under section 202(b), 16 U.S.C. 824a(b), of the FPA. See Dalton Pet. at 25. The United States, represented by the Solicitor General, disagreed, asserting that "the Commission's limited authority to compel interconnections and sales of energy under Section 202(b) does not provide an effective remedy for refusals to deal and other anticompetitive conduct and thus does not bar judicially ordered relief in antitrust cases." Brief of the United States, p. 51, n. 40. The Solicitor General acknowledged, without criticism, Otter Tail's documentation of the "repeated failure of Congress to amend Part II of the Federal

Power Act to add wheeling authority". Id. at 95, n. 77. In Otter Tail this Court agreed with the Solicitor General and declined to defer to what the Commission undoubtedly believed was a "reasonable interpretation of a statute affecting the scope of its jurisdiction." Cf. FERC Br. at 14.

If we are to believe the Commission's brief in opposition in this case, the Commission was right and the Solicitor General was wrong in 1972 when the jurisdictional issue was briefed in Otter Tail; and both the Solicitor General and the Commission erred in failing to bring to the attention of this Court that a stealth provision in the FPA - the second prong of section 206(a) - actually gave the Commission all the authority it needed to compel Otter Tail to engage in wheeling energy to remedy the unduly discriminatory activities with which that public utility was then charged. But this is absurd. The second prong of section 206(a) has not been amended by Congress since 1935. When Otter Tail was briefed the FPC had had over 30 years of experience in regulating the electric industry under section 206(a). It knew the limitations of its authority under the FPA. That, we submit, is why it cited section 202(b) rather than 206(a) as the source of its claimed exclusive authority to compel wheeling.

2. Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988) (AGD), provides no "settled authority" as to the scope of the Commission's jurisdiction to compel all public utilities to provide transmission under section 206(a). Cf. FERC Br. at 11. The Commission states that the Court of Appeals "relied in part" on AGD in affirming the Commission's order requiring involuntary open access transmission. Id. at 8. The Court of Appeals showed no such restraint. It held that AGD "controls the disposition of this issue." (emphasis added.) NY App. C-18. In this the Court erred. AGD did not deprive the Court of

Appeals of its complete discretion when reviewing Order 888. See Dalton Pet. at 23-24. While the FPA and Natural Gas Act (NGA) have parallel provisions, AGD also involved provisions of the NGA which are not to be found in the FPA, namely, the authority to attach reasonable conditions to certificates of public convenience and necessity authorizing the construction and operation of natural gas pipelines. The Commission admits that it has no similar certificate authority as to electric transmission lines under the FPA. FERC Br. at 21, n. 13.

3. In an attempt to rebut Dalton's recital of the measured, modest steps taken by Congress to expand the Commission's transmission jurisdiction, the Commission argues that "[n]othing in Section 211 undermines the Commission's remedial authority under Section 206." FERC Br. at 12, n. 8. The Commission misses the point. After Otter Tail, Congress on two occasions legislated on the Commission's jurisdiction to compel transmission; in 1978 and in 1992. See Dalton Pet. at 26. As Congress oversees the activities of the Commission, it must be assumed that at those times Congress was well aware of the decision in Otter Tail. See Keene Corp. v. United States, 508 U.S. 200, 212 (1993). Nonetheless, in neither instance did Congress indicate that this Court was in error when it held: "So far as wheeling is concerned, there is no authority granted the Commission under Part II of the Federal Power Act to order it". 410 U.S. at 375. That Otter Tail was considered settled law is apparent from the statement in Florida Power & Light Co. v. FERC, 660 F.2d 668, 676 (5th Cir. 1981), cert. denied, 459 U.S. 1156 (1983): "The legislative history of the FPA makes clear that the Commission lacks the authority to require electric utilities to provide wheeling even on a reasonable request.".

4. It is the exclusive province of Congress to rewrite statutes. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 376 (1986). Changes in the competitive scene,

technology and services do not provide the Commission with authority to perform that function. Cf. FERC Br. at 14. The caution exercised by Congress in expanding the Commission's authority over compulsory transmission makes it reasonable to conclude that, in the interest of assuring reliability of electric service, Congress intended that a bright-line jurisdictional test be applied to transmission, not unlike the test used to differentiate between wholesales and retail sales of electric energy in interstate commerce. See FPC v. Southern California Edison Co., 376 U.S. 205, 216 (1964). This Court recognized that distinction in Otter Tail, 410 U.S. at 374, when it stated: "It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships."

CONCLUSION

For the reasons stated, the Petition of Dalton for Writ of Certiorari should be granted.

Respectfully submitted,

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